

STATE OF MICHIGAN
COURT OF APPEALS

ALLSTATE INSURANCE COMPANY,

Plaintiff-Appellee,

v

TINA MARIE WEISHAAR, Next Friend of
DEVIN J. GARTEN, a Minor,

Defendant-Appellant,

and

ESTATE OF BRIAN RUSSELL,

Defendant.

UNPUBLISHED
December 6, 2005

No. 263251
Oakland Circuit Court
LC No. 2004-060666-CK

Before: Talbot, P.J., and White and Wilder, JJ.

PER CURIAM.

Defendant Weishaar appeals as of right from a circuit court order granting plaintiff's motion for summary disposition in this declaratory judgment action. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

At issue is the trial court's ruling that liability coverage was excluded under a policy plaintiff issued to Russell for a house located in Pontiac. The policy excluded coverage for the insured's "business" activities. The term "business" was defined to include "property rented or held for rent," but did not include rental of property when "it is rented occasionally for residential purposes."

We review a trial court's ruling on a motion for summary disposition de novo. *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000). The construction and interpretation of an insurance policy and whether the policy language is ambiguous are questions of law that are also reviewed de novo on appeal. *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 353; 596 NW2d 190 (1999).

It cannot be denied that whatever his original intention, Russell did rent the residence premises to Weishaar. Although they did not execute a formal lease agreement, Weishaar testified at deposition that she rented the house for \$650 a month and paid rent to Russell.

Weishaar cannot attempt to create an issue of fact by stating the contrary in a subsequent affidavit. *Dykes v William Beaumont Hosp*, 246 Mich App 471, 480-481; 633 NW2d 440 (2001). Even if Russell agreed to accept services in lieu of cash, that still constitutes rent. *Grant v Detroit Ass'n of Women's Clubs*, 443 Mich 596, 603; 505 NW2d 254 (1993).

The only question is whether Russell rented the residence premises “occasionally.” Because the word “occasionally” is not defined by the policy, it is to be given its ordinary meaning. *Henderson, supra* at 354. The dictionary definitions include “at times; from time to time; now and then;” and “sometimes.” *Random House Webster's College Dictionary* (1997); *The American Heritage Dictionary of the English Language* (1967).

The evidence showed that Russell may or may not have lived in the Pontiac house before leasing it to defendant, but that issue of fact is not material. He vacated the house and leased it to Weishaar for an indefinite term with an option to buy. Weishaar and her family lived in the house exclusively for close to a year. There is no evidence that at the time Russell leased the house, he intended to return there to live. At best, there is only hearsay evidence that he had a change of heart after the fact. Only evidence admissible at trial may be considered in determining whether a genuine issue of fact exists. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 163; 645 NW2d 643 (2002). Under the circumstances, we find that this was not an occasional rental. *Wonnell, supra* at 826; *Newman, supra* at 4. The trial court correctly granted plaintiff's motion for summary disposition.

Affirmed.

/s/ Michael J. Talbot
/s/ Kurtis T. Wilder